

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
25,477-s42J BY RUSSELL & RUMPH RANCH)

The Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order as entered by the Hearing Examiner on November 24, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

FINAL ORDER

1. Application for Beneficial Water Use Permit Number 25,477-s42J by Russell and Rumph Ranch is hereby denied.

NOTICE

The Hearing Examiner's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 12th day of December, 1980.

David L. Pengelly

DAVID L. PENGELLY, D.N.R.&C.
HEARING EXAMINER

CASE # 25447

AFFIDAVIT OF SERVICE
(Final Order)

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

Gale Greer, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That, on December 12, 19 80, he deposited in the United States mail, a "certified" copy of the Final Order by the Administrator, Water Resources Division, on the application by Russell & Rumph Ranch, Application No. 25,477-s42J, for a permit to appropriate water, addressed to each of the following persons or agencies:

Certified Nos. 51544 to 51545

1. Russell & Rumph Ranch; Biddle, MT 59314
2. R. C. Denson; Box 173; Broadus, MT 59317
3. Keith Kerbel, Field Office Manager; D.N.R.&C.; Miles City, MT 59301
(regular mail)
4. Dave Pengelly; Hearing Examiner; D.N.R.&C.; Helena, MT 59601 (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Dale Greer

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

On this 12th day of December, 19 80, before me, a Notary Public in and for said State, personally appeared Gale Greer, known to me to be the Hearing Reporter, of the department that executed this instrument or the persons who executed the instrument on behalf of said department, and acknowledged to me that such department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 12th day and year in this certificate first above written.

Bethie Lambson
Notary Public for the State of Montana

Witnessed at Helena

My commission expires 6 Oct 1982

CASE # 25447

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
25,477-s42J BY RUSSELL & RUMPH RANCH)

* * * * *

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on October 8, 1980, at Broadus, Montana, for the purpose of hearing objections to Application for Beneficial Water Use Permit No. 25,477-s42J, David Pengelly, Hearing Examiner, presiding.

The Applicant appeared at the hearing by Mr. Robert Rumph. The Applicant was not represented by legal counsel; one (1) exhibit was introduced in support of the Application, to wit:

Applicant's Exhibit:

A-1 Map of proposed project prepared by Jim O'Donnell, Soil Conservation Service.

The Applicant's exhibit was introduced into the record with no objections.

The Objector, Mr. Bob Denson, appeared at the hearing and presented testimony in support of his objection. Mr. Denson was not represented by legal counsel; Mr. Denson introduced two (2) exhibits in support of his objection, to wit:

Objector's Exhibits:

O-1 Copy of Notice of Appropriation Water Right Number 39801 from Powder River County.

O-2 Map of Objector's project and description of the project.

The Objector's exhibits were introduced into the record with no objections.

Montana Department of Natural Resources personnel present at the hearing were Mr. Walt Rolf, Miles City Water Rights Bureau Field Office Engineer; Keith Kerbel, Miles City Water Rights Bureau Field Office Manager; and Gale Greer, Hearings Reporter. The Department was not represented by legal counsel; no exhibits were introduced on behalf of the Department.

SUMMARY OF RECORD

1. On November 5, 1979, the Department received Application for Beneficial Water Use Permit No. 25,477-s42J by Russell and Rumph Ranch to appropriate up to 15 acre-feet per annum from Butte Creek at a point in the SE1/4 NW1/4 NW1/4 of Section 2, Township 8 South, Range 50 East, Powder River County, Montana. The water is to be diverted from January 1 to December 31, inclusive, of each year. The water is to be used for new flood irrigation of ten (10) acres in

the NW1/4 of said Section 2. The water is to be diverted by means of dikes with 15 inch tubes in the dikes for release of the water.

2. On January 10, 17, and 24, 1980, the Department caused to be duly published in the Powder River Examiner, Broadus, Montana, Notice of Application for Beneficial Water Use Permit Number 25,477-s42J.

3. The Department received an objection to the above Application from Mr. R. C. Denson dated February 14, 1980.

PROPOSED FINDINGS OF FACT

Based on the transcript of the hearing and the information contained in the Department's file in this matter, it is found:

1. That the Applicant intends to fill and level Butte Creek as it crosses through the proposed project area and place two (2) dikes across Butte Creek to irrigate two (2) parcels of land included in the project.

2. That the Applicant intends to place a 15-inch open tube in the bottom of each dike to provide for downstream rights.

3. That water flows in Butte Creek only following runoff events from snowmelt.

4. That the Applicant would expect to get one (1) irrigation at the most from the source of supply.

5. That the Applicant intends to grow a hay crop on the irrigated ground.

6. That the spring runoff lasts, at the most, one week.

7. That the Objector has a prior right in the source of supply, that has not been fully satisfied since 1971.

8. That the source of supply for this Application is the same source of supply providing water to satisfy the Objector's prior right.

9. That there was no testimony presented at the hearing regarding the number of acres of land providing runoff that could be appropriated above the Applicant's proposed point of diversion and below several diversion structures located above the Applicant.

10. That the record is not clear as to whether or not water appropriated at the Applicant's point of diversion would in fact reach the points of diversion of the Objector. The Applicant claims that such water would not be available to the Objector, however, the Objector claims that such water would be available for his use.

11. That the Applicant's proposed filling and leveling of Butte Creek would cause the water to spread out on his

fields rather than flow in the Butte Creek channel, therefore, even though 15-inch release tubes would be placed in the bottoms of the diversion dikes, water would be spread out on the fields and allowed to soak into the soil therefore becoming unavailable for downstream appropriators.

12. That there is no testimony regarding any planned uses or developments for which permits have been issued or for which water has been reserved which might be adversely affected or unreasonably interfered with by the Applicant's proposed use of water.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-311, MCA, 1979, states in part that "The department shall issue a permit if:

1. there are unappropriated waters in the source of supply:

a. at times when the water can be put to the use proposed by the applicant;

b. in the amount the applicant seeks to appropriate; and

c. throughout the period during which the applicant seeks to appropriate, the amount requested is available;

2. the rights of a prior appropriator will not be adversely affected;
3. the proposed means of diversion or construction are adequate;
4. the proposed use of water is a beneficial use;
5. the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; ..."

2. It is concluded that there are no unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant; in the amount the Applicant seeks to appropriate; and throughout the period in which the Applicant seeks to appropriate, the amount requested is not available.

3. It is concluded that the rights of prior appropriators may be adversely affected by the granting of this permit.

4. It is concluded that the proposed means of diversion are adequate.

5. It is concluded that the proposed use of water is a beneficial use.

6. It is concluded that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

7. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing on the status of claimed rights of any other party except in relation to those herein applied for, to the extent necessary to reach a conclusion herein.

Based on the Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Application for Beneficial Water Use Permit Number 25,477-s42J by Russell and Rumph Ranch is hereby denied.